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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 799

GRAYLYN BAINBRIDGE CORPORATION, PETITIONER

vs.

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. Its Findings of Fact and Conclusions of Law are found at pages 6-8 of the Record. The opinions of the United States Court of Appeals (R. 53-59) are reported at 173 F. 2d 790.

JURISDICTION

The judgment of the court below was entered on March 24, 1949 (R. 61). On April 18, 1949, the court stayed its mandate pending disposition of the

case by this Court (R. 63). The petition for a writ of certiorari was filed on May 17, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether the Housing Expediter, in the discharge of the duties imposed upon him by the Housing and Rent Act of 1947, as amended, is authorized to inspect housing accommodations claimed by the owner to have been released from control by said Act, without prior judicial determination that the housing accommodations are controlled, as a prerequisite to such investigation, and whether a District Court has injunctive power to enforce that authority.

STATUTE INVOLVED

The pertinent provisions of the Housing and Rent Act of 1947 (61 Stat. 196; 50 U.S.C. App., Supp. I, 1891, et seq.), as amended by Pub. Law 464, 80th Cong., 2d sess., Pub. Law 31, 81st Cong., 1st sess., and the Controlled Housing Regulation (12 F. R. 4331) are set forth in the Appendix, *infra*, pp. 17-22.

STATEMENT

Petitioner owns and operates a structure containing housing accommodations in the Kansas City Defense-Rental Area, at 900 to 908 E. Armour Boulevard, Kansas City, Missouri, which is referred to in the complaint as Graylyn Bainbridge Apartments (R. 1, 54). By Section 204(a) of the Housing and Rent Act of 1947, as amended (*infra*,

p. 18), hereinafter referred to as the "Act," it is provided that the Housing Expediter, respondent herein, "shall administer the powers, functions, and duties" relating to rent control as thereby provided, and by Section 204(d) (*infra*, p. 19), the Expediter is authorized to issue "such regulations and orders * * * as he may deem necessary" to carry out the provisions of that section and Section 202(c).

Pursuant to such authority, respondent issued the Controlled Housing Rent Regulation (12 F.R. 4331), hereinafter referred to as the "Rent Regulation." By Section 6 thereof (*infra*, p. 22), it is provided in effect that any person who offers housing accommodations for rent, and any tenant, "shall permit such inspection of the accommodations by the Housing Expediter as he may, from time to time, require."

Section 202(b) of the Act (*infra*, p. 17) defines "housing accommodations" to mean "any building, structure, or part thereof, * * * (including houses, apartments * * * and other properties used for living or dwelling purposes) together with all privileges, * * * furnishings, * * * and facilities" connected with their use or occupancy. Section 202(c) of the Act, as considered by the courts below, defines the term "controlled housing accommodations" to mean the same "housing accommodations" as defined in Section 202(b) with the exception, among others, of housing accommodations in any establishment commonly known as

a hotel in the community where located, and occupied by persons who are provided "customary hotel services" as there enumerated, *infra,* p. 18.

The Emergency Price Control Act of 1942, as amended (50 U.S.C. App., 901, et seq.), and Regulations issued thereunder, established maximum rents for housing accommodations prior to the expiration of such Act on June 30, 1947 (*infra,* p. 17). In proceedings before the District Court, petitioner admitted that prior to such date, the housing accommodations in the Graylyn establishment were controlled under the 1942 Act (R. 26). The Housing and Rent Act of 1947 became effective July 1, 1947. Section 204(b)(1) of such Act, as amended by Pub. Law 464, 80th Cong., 2d sess., prohibits the demand or receipt of any rent for controlled housing accommodations greater than the legal maximum established under authority of the 1942 Act, and in effect with respect thereto on June 30, 1947 (*infra,* pp. 18-19).

On or about July 14, 1948, petitioner, through its attorney, advised representatives of the Housing Expediter that they had no right or authority to make an inspection of the Graylyn Bainbridge establishment and to interview occupants of the housing accommodations therein for the reason, as claimed by petitioner, that said establishment under the Act "was decontrolled" (R. 5). Because of such refusal, respondent, on July 19, 1948, in accordance with the provisions of Section 206 (b) of the Act (*infra,* pp. 19-20), filed the complaint

herein (R. 1). In such pleading, respondent prayed for a preliminary and permanent injunction ordering and directing petitioner to permit representatives of the Office of the Housing Expediter to inspect the accommodations in the Graylyn Bainbridge structure, and to interview the tenants thereof as may from time to time be required; also, that petitioner be enjoined and restrained from interfering with respondent's representatives in carrying out such inspection and interviews (R. 1-2). The complaint alleged that petitioner, by refusing to admit representatives of respondent for the purpose of making inspections and interviewing tenants of the accommodations, was engaged in acts and practices which constituted violations of said Section 6 of the Rent Regulation, and that such violations would continue unless enjoined and restrained (R. 2).

Petitioner, by its answer, denied operation of housing accommodations known as "Graylyn Bainbridge Apartments," as referred to in the complaint, and alleged ownership and operation of the "Bainbridge Apartment Hotel," which was alleged to be a hotel within the meaning of the Act (R. 4). In the same pleading, it was alleged that such structure was decontrolled under the Housing and Rent Act of 1947, and that respondent is not vested with authority to make any administrative determination or finding with respect thereto (R. 4-5). The answer admitted that on or about July 14, 1948, petitioner stated through its attorney to representa-

tives of respondent that they had no right or authority to make an inspection of the establishment and to interview the occupants, for the reason that the establishment was decontrolled by the Act, and in that connection, requested said representatives to cease and desist from any attempted inspection and interviewing of occupants (R. 5).

At a trial upon the merits before the District Court, it was established that the Expediter had received complaints regarding overcharges in rent by the petitioner for the housing accommodations involved, of evictions not contemplated by the Act, and of certain evasive practices being indulged in by the petitioner (R. 44). At such hearing, the case was submitted upon the complaint and answer, together with an offer of proof which the trial court allowed petitioner to make upon its contention that the Graylyn establishment "is a hotel" (R. 27). In this connection, the District Court stated, respecting Section 6 of the Rent Regulation (R. 28):

> That being a valid regulation issued by the Housing Expediter under the provisions of the Act, I take it that he has the right to make the inspection of any rental property, regardless of the fact whether it is controlled or decontrolled in this defense-rental neighborhood.

After considering petitioner's offer of proof (R. 28-42) and the pleadings, the trial court held that respondent was entitled "to a mandatory injunction, sustaining his right to inspect these premises" (R. 42). The trial court found that petitioner had

refused to permit respondent's representatives to inspect the housing accommodations (R. 6). Among other conclusions of law, the District Court held that (1) the right of inspection and investigation by respondent of any housing unit in a defense-rental area was not dependent upon a prior judicial determination that the housing unit was a controlled housing accommodation under the Housing and Rent Act of 1947; (2) that under that Act, respondent had the right to make an investigation and inspection upon complaints received by him, or upon probable cause, the existence of which was to be determined by him; and (3) that petitioner's refusal to permit the investigation and inspection violated the Act and Section 6 of the Regulation (R. 7). Accordingly, the District Court issued an order directing petitioner to permit the representatives of respondent to inspect the housing accommodations and interview the tenants thereof (R. 8-9). On appeal, the judgment was affirmed by the court below (Judge Riddick dissenting) in a decision holding that the inspection provisions of the Rent Regulation were "more than consistent" with the Act; and that they were "essential to the performance of his [respondent's] duties under the Act" (R. 58).

ARGUMENT

1. The courts below were clearly right in directing petitioner to permit inspection of its housing accommodations by the Expediter's representatives with the consent of the tenants and in ordering

petitioner to cease obstructing the investigation and the interviews of the tenants (R. 6-9, 55-59), without regard to whether the housing accommodations were controlled or decontrolled (R. 28, 57-58). It is now well settled that a predetermination of "coverage" as a prerequisite for administrative investigation and inspection is unnecessary. *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501; *Oklahoma Press Publishing Company* v. *Walling,* 327 U. S. 186, 214.

Although the Housing and Rent Act of 1947, prior to the amendment of March 30, 1949 (Pub. Law 31, 81st Cong., *infra,* pp. 20-22, did not expressly provide for inspections by the Housing Expediter, Section 204(a) of that Act, *infra,* p. 18, conferred upon the Housing Expediter broad authority to enforce the rent control provided for by the Act, and by Section 204(d) thereof the Expediter was invested with equally broad authority to issue such "regulations and orders" as he should deem necessary to carry out the provisions of that section and Section 202(c). Pursuant to that authority, the Expediter issued Section 6 of the Rent Regulation, *infra,* p. 22, providing that owners and tenants should permit such inspections of rented housing accommodations as the Housing Expediter should from time to time require. The inspections therein provided for were, as held by the court below, essential to any effective enforcement of the Act[1] (R.

[1] The need for investigation in the case at bar was clearly established. It was represented to the trial court that the Expediter had received complaints concerning "overcharges

58). Without this arm of enforcement, violations of the Act and the Rent Regulation could be committed with impunity.

The holding, concurred in by both courts below, that the 1947 Act impliedly authorized the Expediter to interview tenants and inspect rental housing notwithstanding the fact that at that time the Act did not expressly provide for such inspections, is in accord with the established rule that so long as the evidence sought by an investigation is not plainly incompetent or irrelevant to any lawful purpose of the administrative officer in the discharge of his duties under the law, it is the duty of the court to permit the investigation to go forward. See *Endicott Johnson Corp.* v. *Perkins, supra,* at page 509. And the power of the Expediter to investigate was in the statute by necessary implication. *Oklahoma Press Publishing Company* v. *Walling, supra,* at page 210.

The Court of Appeals for the Second Circuit in holding that the 1947 Act impliedly authorized the Expediter to inspect rented housing accommodations, said: "* * * the duties imposed by the Act of 1947 as well as the regulation adopted pursuant to Section 204(d) thereof justify the right to inspect leased premises in order to detect violations."

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in rent, evictions not contemplated by the Act," and of "certain evasive practices" (R. 44), and that it was necessary to interview the occupants of the accommodations in order to determine whether they were receiving "customary hotel services," as enumerated in Section 202(c) of the Act, *infra*, p. 18, and as "habitual and customary" in the community of Kansas City (R. 44).

Woods v. *Carol Management Corp.*, 168 F. 2d 791, 792.[2]

In any event, the Housing and Rent Act of 1947, as amended by the Act of March 30, 1949 (Pub. Law 31, 81st Cong., Section 206(f) (1), *infra*, p. 21), now expressly confers upon the Housing Expediter authority to make such studies and investigations and hold such hearings as he deems necessary or proper to assist him in the administration and enforcement of the Act and regulations and orders prescribed thereunder. Consequently, the Act as it now exists would control further proceedings in this case. "A change in the law between a *nisi prius* and an appellate decision requires the appellate court to apply the changed law." *Ziffrin, Inc.* v. *United States*, 318 U. S. 73, 78; *Vandenbark* v. *Owens-Illinois Co.*, 311 U. S. 538, 541-543; *United States* v. *The Schooner Peggy*, 1 Cranch 103, 110. This rule is peculiarly applicable to injunctive relief, which operates *in futuro*. *Duplex Co.* v. *Deering*, 254 U. S. 443, 464.

Petitioner argues that the Housing and Rent Act of 1947, both before and after the 1949 amendment, limits the Expediter's administrative authority to "controlled" housing accommodations (Pet. 11-12). In other words, petitioner urges that the Expediter may inspect rented housing

[2] The housing accommodations involved in the *Carol* case were controlled, but the decision squarely holds that the 1947 Act authorized the Expediter to inspect rented housing accommodations despite the fact that the Act did not in terms provide for investigations.

only after he brings a suit alleging that the housing is controlled and that the owner or agent thereof has engaged in or is about to engage in practices which will violate the Act, and has obtained in such suit a judicial determination that the particular housing is controlled. This puts the cart before the horse. The Expediter should not be required to sue before he has an opportunity to make a preliminary investigation of the facts so as to determine whether there is any basis for a suit. There is no such restriction in the statute.[3] We believe, therefore, as this Court stated with respect to the Wage and Hour Law, "that the Congress has authorized the Administrator [Housing Expediter], rather than the district courts in the first instance, to determine the question of coverage in the preliminary investigation of possibly existing violations." *Oklahoma Press Publishing Co. v. Walling, supra,* at page 214.

There is no fundamental distinction between the instant case and the *Oklahoma Press Publishing Company* and *Endicott Johnson* decisions,

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[3] It is true that Section 206(f)(2) of the Act as amended in 1949, *infra*, p. 21, expressly authorizes the Expediter to inspect "controlled" housing accommodations. However, since the provision in Section 202 of the Act which decontrols housing accommodations known as hotels makes that decontrol depend upon the service rendered to the guests, we submit that it would be unreasonable to assume that the Congress intended the provision for inspection in Section 206(f)(2) to debar the Expediter and his duly authorized representative from interviewing tenants in their apartments after receiving complaints from them, for the purpose of making a preliminary investigation of possibly existing violations.

supra. Under the Public Contracts Act considered in the *Endicott Johnson* case, the Secretary of Labor, following his investigation, makes a formal determination of coverage, and imposes sanctions in the administrative proceeding subject to customary court review (41 U.S.C. 36-39). Under the Fair Labor Standards Act, the Administrator of the Wage and Hour Division, like respondent, as a result of his investigation, determines only whether to institute court action seeking the imposition of statutory sanctions. This is merely a difference in the scope of the ultimate administrative function. But, under all the Acts, the purpose of the inspection is to aid in the effective discharge of administrative authority. Accordingly, the same considerations which make it improper for a District Court to undertake the determination of coverage when called upon to enforce an investigation under either the Public Contracts Act or the Fair Labor Standards Act, make it equally improper for a District Court to undertake the determination of coverage under the Housing and Rent Act of 1947, as amended, in a suit to enforce a preliminary investigation.

Practical considerations also require rejection of petitioner's strained construction of the Act. There are thousands of owners of housing accommodations who believe they were decontrolled by the Act of 1947 for one reason or another. If a court decision as to coverage were a prerequisite of inspection, inspections could be blocked by the assertion of claims that property was not con-

trolled, with knowledge that this would in and of itself postpone enforcement of the Act—which is of short duration—for many months, as in this very case. And the number of cases which might be required to enforce the Act might impose a serious burden on the courts. For rent control to be effective, detection of violation must not be postponed. "Delay might do injury beyond repair" (cf. *Fleming* v. *Mohawk Wrecking & Lumber Company,* 331 U. S. 111, 123).

Petitioner's contentions that the inspection will cause inconvenience to it and its tenants and that it will destroy its established good will (Pet. 10), are without merit. We agree that the tenants would have some cause for complaint here, if the proposed investigation constituted an "unreasonable search and seizure" as to them. No such claim is made. In any event, petitioner may not assert constitutional privilege allegedly belonging to others (*Blair* v. *United States,* 250 U. S. 273; *United States* v. *Goldstein,* 120 F. 2d 485, 489 (C.A. 2), affirmed sub nom. *Goldstein* v. *United States,* 316 U. S. 114, 121). Nor has petitioner asserted any claim that the decision below would deprive it of any of its own constitutional rights.

Petitioner cites no decisions in support of its contentions except *Federal Trade Commission* v. *American Tobacco Company,* 264 U.S. 298. Reliance upon this authority is clearly misplaced. In the *American Tobacco Company* case, the subpoena was not limited to documents which would have been material or relevant to a lawful inquiry, but

extended substantially to all of the respondent's papers "relevant or irrelevant, in the hope that something [would] turn up" (264 U.S. at p. 306). In other words, the holding of this case, as construed by many cases,[4] is that the Government may demand only records and documents that are relevant to a lawful inquiry, and may not conduct a "fishing" expedition into all documents, whether related or unrelated to the subject of the investigation. The decision in the *American Tobacco* case is plainly inapplicable here. In the case at bar, no information is sought from the petitioner itself, but only from its tenants, and as to the latter, the information sought is unquestionably relevant to a lawful inquiry. The tenants, too, are adequately protected by the District Court's decree (R. 8-9). If they do not wish to answer or to provide information, they may be silent. If they wish to speak, their answers can readily and conveniently be recorded against the questions which have been approved as to the form and content by the court below. Thus, they are allowed to exercise their right to speak free from the many obstacles which petitioner has seen fit to throw in their way.

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[4] *Oklahoma Press Publishing Company* v. *Walling*, *supra*, 327 U.S. 186, at p. 201, footnote 27; *Fleming* v. *Montgomery Ward & Company*, 114 F. 2d 384, 390-391 (C.A. 7), certiorari denied, 311 U.S. 690; *United States* v. *United States Tariff Commission*, 6 F. 2d 491 (C.A. D.C.); *Federal Trade Commission* v. *National Biscuit Company*, 18 F. Supp. 667, 671 (S.D. N.Y.).

2. Petitioner questions the jurisdiction of the District Court to grant injunctive relief in this case (Pet. 8). However, the question appears to rest on the premise that the Expediter is not entitled to such relief, rather than on the lack of organic jurisdiction in the court. Section 206 of the Act, both before and after the 1949 amendment, plainly vests the District Court with jurisdiction to grant injunctive relief where in the judgment of the Expediter any person has engaged or is about to engage in practices which are violations of the Act. Section 6 of the Rent Regulation is but an implementation of Sections 202(c) and 204 of the Act. Consequently, Section 6 is a part of the Act, and a violation of that section constitutes a basis for invoking the injunctive provisions of Section 206(b) of the Act.[5] Hence, the contention that the District Court was without jurisdiction is groundless.

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[5] Section 206(b), as amended by the 1949 amendment, expressly provides for injunctive relief for violations of regulations and orders issued under the Act, as well as for violations of the Act.

CONCLUSION

The decision of the Court below is clearly correct. There is no conflict of decision and further review is not warranted. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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JUNE, 1949.

APPENDIX

Emergency Price Control Act of 1942, as amended (50 U. S. C. App., 901, et seq.):

> SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

Housing and Rent Act of 1947 (61 Stat. 196, 50 U. S. C. App., Supp. I, 1891, et seq.), as amended by the Act of March 30, 1948 (Pub. Law 464, 80th Cong., 2d sess.):

> SEC. 202. As used in this title—
>
> * * * * *
>
> (b) The term "housing accommodations" means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes (including houses, apartments, rooming- or boarding-house accommodations, and other properties used for living or dwelling purposes) together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property.

(c) The term "controlled housing accommodations" means housing accommodations in any defense-rental area, except that it does not include—

(1) those housing accommodations, in any establishment which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; or * * *

Sec. 204. (a) The Housing Expediter shall administer the powers, functions, and duties under this title; and for the purpose of exercising such powers, functions, and duties, and the powers, functions, and duties granted to or imposed upon the Housing Expediter by title I of this Act, the Office of Housing Expediter is hereby extended until the close of March 31, 1949.[6]

(b)(1) Subject to the provisions of paragraphs (2) and (3) of this subsection, during the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency

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[6] Public Law 31, 81st Congress, amended Section 204(a) to extend the Office of Housing Expediter "until the close of June 30, 1950."

Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: *Provided, however,* That the Housing Expediter shall, by regulation or order, make such individual and general adjustments in such maximum rents in any defense-rental area or any portion thereof, or with respect to any housing accommodations or any class of housing accommodations within any such area or any portion thereof, as may be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title. In the making of adjustments to remove hardships due weight shall be given to the question as to whether or not the landlord is suffering a loss in the operation of the housing accommodations.

* * * * *

(d) The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202 (c).

Sec. 206. * * * (b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a

permanent or temporary injunction, restraining order, or other order shall be granted without bond.

Housing and Rent Act of 1947, as further amended by the Act of March 30, 1949 (Pub. Law 31, 81st Cong., 1st sess.):

Sec. 202 * * *

(c) The term "controlled housing accommodations" means housing accommodations in any defense-rental area, except that it does not include—

(1) (A) those housing accommodations, in any establishment which is located in a city of less than two million five hundred thousand population according to the 1940 decennial census and which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; or * * *

Sec. 206 * * *

(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction

for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

* * * * *

(f) (1) The Housing Expediter is authorized to make such studies and investigations, to conduct such hearings, and to obtain such information, as he deems necessary or proper to assist him in prescribing any regulation or order under this Act, or in the administration and enforcement of this Act and regulations and orders prescribed thereunder.

(2) For the purpose of obtaining information under this subsection, the Housing Expediter is further authorized, by regulation or order, to require any person who rents or offers for rent or acts as broker or agent for the rental of any controlled housing accommodations (A) to furnish information under oath or affirmation or otherwise, (B) to make and keep records and other documents and to make reports, and (C) to permit the inspection and copying of records and other documents and the inspection of controlled housing accommodations.

(3) For the purpose of obtaining information under this subsection, the Housing Expediter may by subpena require any person to appear and testify or to appear and produce

documents, or both, at any designated place. * * * .

Controlled Housing Rent Regulation (12 F. R. 4331):

Sec. 6. *Inspection.* Any person who rents or offers for rent or acts as a broker or agent for the rental of housing accommodations and any tenant shall permit such inspection of the accommodations by the Housing Expediter as he may, from time to time, require.

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